In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 6172

NG MON TONG,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge.*

Brief of Appellant

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STATEMENT

Appellant applies for admission to the United States as a Chinese-born son of an American citizen. The evidence produced before the special examiners, conclusively establishes his right to admission under the laws and regulations of the United States. And that evidence stands unquestioned and unimpeached by any evidence or circumstances appearing in the

record. Appellant feels that the denial of his application by the Special Board is an arbitrary ruling, unsupported except by the suspicion and prejudice of the members of the Board.

Applicant's witnesses, his father Ng Ngin, and prior-landed brother, Ng Mon Won, were examined at Houston, Texas, on January 20, and 21; without any apparent cause therefor, the record was returned to Texas for the re-examination of these witnesses, which occurred February 26, 1930. When the second examination was ordered by the Seattle Board, the Houston Board was directed to put to the father and the prior-landed son, the exact questions propounded to the applicant in Seattle. These witnesses were again subjected to a most rigid examination, obviously for the purpose of developing discrepancies.

We would be very pleased to have the court read the report of the examining inspector in this last examination at Houston, Texas; it is found on pages 35 and 36 of the written record. This report clearly shows that no material discrepancies occurred between the last and the first examination of these witnesses, and that report closes with this very pertinent statement:

> "With the foregoing, it is believed that the primary discrepancies heretofore shown to exist have been accounted for or duly explained."

Surely, that voluntary statement, over the signature of the immigrant inspector, who examined the witnesses and had the opportunity to observe their demeanor and actions on the witness stand, is of more force and effect than the suspicions and conjectures of the members of the Seattle Board, who never saw or heard either of the witnesses, and who condemned them as deceivers and frauds.

THIS APPLICATION WAS FIRST SUBMITTED TO A SPECIAL BOARD AT SEATTLE, WASHINGTON, JANUARY 6, 1930, composed of Inspector W. E. Ainsley, Chairman, Inspector H. G. Hall, member, and Isabella M. Oliver, stenographer. This Board forwarded the record to Houston, Texas, for the purpose of taking the testimony of the father and prior-landed son. Upon receipt of these records by the Seattle office, they were again forwarded to Houston, Texas, where the father and prior-landed son were re-examined; thereafter the record with the re-examination, was returned to the Seattle Immigration Office March 13, 1930. (See page 15, Chairman's Final Findings and Order.)

Some time prior to the return of this re-examination, the special Board of Investigation withdrew from the case, voluntarily or involuntarily, we cannot say; it is disclosed in the record somewhere that the Chairman of the first Board was transferred to another Immigration Station.

On page 9 of the last portion of the special board's record, will be found a record of the first proceedings of the second special Board of Investigation assigned to this case, R. M. Porter, Chairman, R. C. Matterson, member, Francis M. Miller, typist, "in lieu of former Board * * * none of whom are available." It will be observed that this new Board went into session for the consideration of this case for the first time on March 14, 1930, the voluminous record having arrived from Texas the day before. The hearing was closed on that date, the Chairman's lengthy report is dated the next day, March 15, 1930. These dates are indisputable evidence of the fact that this large record was not read and considered by the members of this Board at any time, or at all, before the Chairman wrote up and signed his Findings.

Quite evidently this new Board, having decided to arbitrarily deny the application, the Chairman sought out enough of the record to justify, as he imagined, his Conclusions and Findings, for the rejection of the applicant. This circumstance alone, justifies the claim that this applicant has not had a fair and unbiased trial by a whole Board of Special Investigation as required by the law.

This applicant claims to be the son of an American-born citizen, and as such, has the right to come into

and live in the United States as a citizen of this nation. Upon complying with certain formalities, as was done in this particular case, the applicant is entitled to a fair and just hearing and conscientious consideration of his testimony and the testimony of his witnesses. The last Board has not accorded to him that kind of a hearing and consideration.

ASSIGNMENT OF ERRORS

1. The Court erred in holding and deciding that a writ of habeas corpus should be denied applicant herein.

2. The Court erred in holding that there is any evidence in the record whatever substantiating the findings of the Commissioner of Immigration in holding that the applicant is not the son of Ng Ngin.

3. The Court erred in sustaining each and all of the findings of the Commissioner of Immigration upon which he denied applicant admission into this country as a citizen of the United States.

4. The Court erred in refusing to hold that this appellant was denied a fair and impartial hearing.

ARGUMENT

The Board who first entered upon the investigation of this case were evidently not satisfied with the testimony concerning the applicant's place of birth,

nor with his testimony concerning the village of his birth, nor with his description of the family of which he claimed to be a member. In consequence of which, that Board returned the record to Texas for the purpose of having applicant's father and landed brother re-examined as to all the conditions, circumstances and transactions regarding the family and the village.

It is worthy of note that after a most rigid examination of the father and the landed brother, based upon substantially the same questions propounded to the applicant, no material discrepancies are pointed out. Anyone accustomed to considering the testimony of witnesses, must be impressed with the frankness of the witnesses and with the guileless manner in which all the information was given that the inspector requested.

And notwithstanding the evident feeling of suspicion of the Special Board that made the Findings, the Chairman thereof, in his final report states:

> "A close study and comparison of the testimony of alleged father and prior-landed brother taken at Houston, Texas, Jan. 20, 1930, and Feb. 26, 1930, and testimony of applicant on original examination and upon recall, leave no doubt in the minds of the members of the Board that applicant is a resident of the same village as the alleged father and prior-landed brother."

Then follows the suggestions that discrepancies in the testimony of the three witnesses might indicate that the applicant was not a member of the same household.

Then on pages 16 and 17 the Chairman sets out eight discrepancies that he thinks justify the doubt of the applicant being a member of the same household as the father and prior-landed brother. Without taking the space or the time to discuss, at length, each of the eight points, we make the broad statement that not one of them is at all material in ascertaining the question involved in the inquiry: Is the applicant the son of an American-born Chinese? The matter of these discrepancies are not seriously urged, by the Immigration Bureau, against the application for the writ in this case.

For instance, the Chairman of the Board in his first specification, complains because the applicant is not able to give the correct names of his grandfather and other ancestors. He answered these questions as intelligently as any person of his age would ordinarily do. It is true that the father says he was home in China when the youngest son was born. This applicant testified positively that the child was born two or three months after the father left. Surely, because this boy may have made a mistake as to when his

father left in relation to the birth of the last child, it cannot be urged as a reason for denying his admission to this country, nor to discredit his testimony. If this applicant, as this last Board indicated, was deceiving the Board and perjuring himself, he would not have answered this question so firmly and so positively. The answers are not the answers of a liar. He was just mistaken.

The same observation is true as to specification No. 6. There, the father and landed son, when the father was in China the last time, took a joint trip to Hongkong, where they were gone for some days.

This boy, applicant, in his testimony, on re-examination, testified:

"Q. Did your older brother Ng Mon Won accompany your father to Houkgonk when your father returned to the U. S.? A. No.

Q. How is it that your father and brother Ng Mon Won both describe a trip that they made to Hongkong and were gone from the village two or three weeks, and you seem to know nothing about it? A. My father never took Ng Mon Won to Hongkong."

These answers are not hedged in as is customarily done by those who testify falsely. He testified exactly as any American boy of that age would have testified in the same circumstance. The reason for his lack of knowledge concerning that trip is quite apparent to

any father of three or four boys of that age. This applicant's father and oldest brother, evidently had agreed upon that trip; perhaps they told this applicant and his twin brother, in the presence of the mother, that they were going some other place nearby. By so doing this applicant and his twin brother were pacified. Whereas, if they knew that the father and this oldest brother were going to Hongkong they also would insist upon going, or the ordinary consequences would follow to the great annoyance of the mother and two younger children.

The other inconsistencies are limited to some minor descriptions of the village, the location of the railroad station and floors and windows in the schoolhouse.

Therefore, the investigating board might as well have frankly conceded that their only reason for excluding this applicant is his age. Just a year prior to this applicant's examination, his landed brother was examined here in Seattle and duly and regularly admitted as the blood son of this applicant's father.

Applicant's Age.—Applicant's father and his oldest brother testified positively to the applicant's age —about fourteen years. As against this positive testimony, there is not one word offered in contradiction of it. The Board's Finding of a greater age is based en-

tirely upon their individual opinions and the opinion of a doctor connected with the Immigration Service here in Seattle. From their individual opinions as to the age of this applicant and a written statement by this doctor, they establish, in their judgment, the positive fact that this applicant cannot be the son of the alleged father.

We respectfully contend that such a conclusion is not justified in law. Furthermore, the record refutes any such inference.

Just before the close of the re-examination of the applicant on March 14, 1930, each member of the Board had his guess as to the applicant's age recorded.

"Chairman (to Inspector Matterson): What age would you judge this applicant to be?

A. (By Inspector Matterson.) From the height and general appearance of applicant, his manner of testifying, and the fact that his voice is heavy like a boy who has passed the age of puberty, I believe him to be between seventeen and twenty years of age, American reckoning.

Chairman (To Clerk Miller): What is your opinion in regard to the age of applicant?

A. (By Clerk Miller.) I would estimate him to be not less than sixteen years of age by American reckoning, and not more than twenty years.

By Chairman: Judging from the general appearance of applicant and his manner of speech, I believe him to be not less than seventeen years

of age and not more than twenty-one years of age."

And this is the statement of Dr. Bailey:

"Commissioner of Immigration
Seattle, Washington.
"Sir:

"In regard to the case of Ng Mon Tong, which was referred to me for my opinion as to his approximate age, judging from his general appearance, teeth and sexual development, I am of the opinion that he is between 17 and 22 years of age.

"Respectfully,
A. R. BAILEY,
A. A. Surgeon."

Dr. Bailey does not even taken the chance to certify to this statement. He was not present at the hearing.

Such an *ex parte* statement would not be received as evidence for any purpose in any court or Board of Inquiry anywhere in America. The most valuable right that any human being can claim is involved in this hearing. Congress never intended that that right should be dependent upon such speculative and impulsive guesses.

As stated by Circuit Judge Anderson in *Johnson vs. Damon,* 16 Fed. (2d), 65:

"The mind revolts against such methods of dealing with vital human rights."

In that case, the Special Board made the order of exclusion upon so-called discrepancies in the testimony.

We shall now direct the court's attention to what the record discloses as to the age of this applicant. The father lived in this country thirty years before returning to China and marrying for the first time in 1911. He returned to the Port of San Francisco from China, May, 1913. Before he returned from that first trip, the oldest son, now living here, was born, the only child born during the two years of his married life.

On December 22, 1916, he again visited China, going through the Port of San Francisco as an American citizen. He returned to this country on May 17, 1919, at which time he described his wife and oldest son as he had in May, 1913, and stated that he had two sons born during this second trip, describing them as twins, Ng Mon Tung and Ng Mon Park, three years old. It will be noted that upon his return and in his written report to the Immigration Station in San Francisco, he gave the age of these twins, one of them this applicant, as three years in May, 1919, so they must have been ten years older in May, 1929, and no doubt, in January, 1930, when the first examination was had, they must have been in their fourteenth year. This conclusion is warranted by the applicant's own

testimony when he was describing his school attendance in his native village.

> "Describe your school experience. A. I started when I was 10 years old in the Woon Hen Doon schoolhouse in our village. I was there continually until a few days before I left home for this country.
>
> Q. How long altogether have you attended school? A. Four years, altogether.
>
> Q. What was the name of the teacher you had when you went to school with your older brother, Mon Won, that year? A. Wong Yow Hong, he was the only teacher who taught in that school.
>
> He still teaches there."

This information was given when the applicant had no thought of specifying his exact age. Other incidents which appear in the brothers testimony and the father's testimony clearly indicate that at the time this applicant was examined by the Board, and the statement made by Dr. Bailey, he was somewhere between fourteen and fifteen years of age.

All persons familiar with the testimony of Chinese as to their ages and to exact dates, recognize the difficulty in having the Chinese method of figuring dates and time harmonize with Western methods.

This Board, as well as the courts generally, also recognize the fact that strong, healthy Oriental chil-

dren arrive at the age of puberty much earlier than American children; and furthermore, that it is very difficult for an Occidental to ascertain the age of Chinese or Japanese by merely talking to and looking at them.

The applicant's answers to the questions propounded to him in this record plainly disclose that the answers came from an immature and youthful person. The writer, met and observed this applicant on three different occasions, observed his voice and his manner in replying to the questions propounded by the interpreter, as well as his walk, movements and mannerisms. His swinging gait, the movement of his body, of his hands, his arms and his legs indisputably branded him a young, awkward boy. It is true, that he seems tall; he has very, very thick jet black hair. The movements and muscles of his face and mouth clearly indicate his youth.

It must not be overlooked that the actual age of this applicant, on this hearing, is not so material. Under the statute he was entitled to be admitted immediately after he was born, if he was then eligible; that right remains with him so long as he lives. This collateral question, can only be considered as bearing upon the credence to be given to the testimony of the father and the applicant. If it is established by the

record that this applicant is the blood son of the father, an American citizen, even if the father and the applicant recklessly or unintentionally misstated the age of the applicant, that would not deprive him of his rights to enter this country as an American citizen.

We concede that many cases have appeared in the District and the Circuit courts involving the denial of admission to this country by Chinese who were older than they claimed to be. By examination, it will be discovered that practically all of these cases under the statute permitting minor children of Chinese merchants to come into this country as such minors. In these cases the exact age of the minor is the entire issue and question involved on the hearing; it is a jurisdictional point. This condition does not obtain in this case.

There is no substantial evidence to be found in the record justifying the conclusion that this applicant is older than he, his father and brother testified to. The Chairman of the Special Board of Inquiry expressed the opinion that the applicant was not less than seventeen years and not more than twenty-one years; the other inspector gave the opinion that the applicant was between the ages of seventeen and twenty; the clerk gave the opinion that the applicant was not less

than sixteen years and not more than twenty years; and the doctor, in his letter, stated that he thought the applicant was between seventeen and twenty-two years of age.

Surely, this applicant's rights cannot be dependent upon these four guesses, each guess different from the other three, not one of the guesses venturing to state the age nearer than three or four years; the doctor's range is five years.

CITATIONS

When it is held that these guesses may not be considered as evidence, then, it necessarily follows, that there is no evidence whatsoever in the entire record justifying the Findings of the Board in this case; it would appear that the opinion of the Circuit Court, this Circuit, written by Justice Gilbert, in *Woo Hoo vs. White,* 156 C. C. A., 239, is very applicable to this particular question; in that opinion the court decided:

> "The doubt expressed by the Commissioner General as to the alleged age of the applicant was based upon a certificate of two surgeons that, after a careful consideration of the physical characteristics, they were of the opinion that 'his age is within one year either way of 23 years.' It is not represented that the certificate was based upon any scientific data, or otherwise than upon the general appearance of the applicant. Upon such a

> question, the opinion of a surgeon is believed to be of no greater value than that of a layman, and in either case it has but little probative value to show a difference of age of only two years. There are circumstances connected with the examination of the applicant which, unexplained, tend to indicate an unfair attitude on the part of the immigration officials."

Likewise, in this case, circumstances are recorded in the record indicating "an unfair attitude on the part of the immigration officials." As already indicated, in the preceding pages, this last Board only saw the applicant while he was being re-examined. No member of it ever saw the voluminous record accumulated before it arrived from Texas, the day before this Board went into its final session. It would seem physically impossible for the different members of the Board to have read and considered this record prior to or during the final examination of this applicant.

For instance, in their Findings, on page 17, setting out the material dates, the Board sweeps them entirely aside with this Finding:

> "It is apparent that these dates were chosen because of the ease with which they could be remembered, and are undoubtedly fictitious."

Such conduct on the part of immigration inspectors was justly criticized and condemned in *Johnson vs. Damon,* 16 Fed. (2d) 65, wherein Judge Anderson observed:

> "As the court below found, the testimony of these four witnesses was consistent on all material points. But the immigration tribunals in effect adjudged the case fraudulent and fabricated—flat perjury.
>
> "Judge Morton, after a careful examination of the evidence, in an unpublished opinion, found that the discrepancies relied upon by the immigration tribunals were 'so slight and insignificant as to afford no basis for a fair-minded tribunal to reach such a conclusion in disregard of the weighty evidence in the applicant's favor.' Examination of the record drives us to the same conclusion.
>
> "This court has by repeated decisions shown its full appreciation of the very narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review the decisions of the immigration tribunals. *Cf. Johnson vs. Kock Shing* (C. C. A.) 3 F. (2d) 889; *Ng Lung vs. Johnson* (C. C. A.) 8 F (2d) 1020. In many cases this court has felt bound to sustain results grounded upon a finding of deliberate perjury, when the evidence in support of so serious a proposition seemed inadequate, if weighed as courts and juries are expected to weigh such evidence. But there is a limit beyond which no fact-finding tribunal can go in finding a case made up out of whole cloth. This seems to us such a case."

The government inspector in Texas, who examined the father and landed brother on two different occa-

sions, on the latter for the special purpose of developing inconsistencies with the previous examination and with the answers given by the applicant, reported with the return of the record, "With the foregoing, it is believed that the primary discrepancies heretofore shown to exist have been accounted for or duly explained." He had the opportunity to see and observe these two important witnesses and he gives them the stamp of approval.

An unverified statement or letter from a clerk of a court of record could not be received in an investigation of this kind.

Barder vs. Zurbrick, 38 Fed. (2nd) 472.

U. S. ex rel Fong On vs. Day, 39 Fed. (2nd) 202, a decision of the U. S. District Court, N. Y., seems to have involved practically the same questions that are presented in this case. There, the Chairman of the Board of Review stated:

> "However, the outstanding adverse feature in this case is the fact that, whereas the applicant claims and is claimed to be twelve years old and cannot be the son of his alleged father if he is above that age, he has been adjudged by the examining medical officer at the port after a physical examination to be not less than sixteen years old. And the full length photograph of the applicant bears out the statement of the Chairman of the Board at the port that the applicant appears

to be nearly twice the age claimed. While estimates of age at other periods may not closely be made with certainty, in the opinion of the board of review it is not possible that a claim could be maintained that an individual who is beyond adolescence and entering upon maturity as attested by a medical officer is of the age of a child approaching puberty.'

And, there, as here, the Board requested the doctor connected with the service to make a statement as to his opinion of the age of the applicant and he replied as follows:

"Re: Chinese Fong Bing Len

"In compliance with the request of the assistant commissioner of immigration, I have this day examined the above named alien and in my opinion he is at least sixteen (16) years of age.

E. H. MULLAN
"Surgeon P.H.S."

And, in considering the statement of the doctor, the judge observed:

"First, that it does not state Dr. Mullan's qualifications, except such presumption thereof as may be involved in the description "Surgeon P.H.S." after his signature; and

Second, that it is a mere statement of a conclusion of fact without a description of the examinations and testimony of which it was based.

"Such an informal certificate may be satisfactory as an intradepartmental memorandum, but it does not satisfy an independent tribunal which is called on to pass on the question whether Fong

Bing Len had a fair trial on the issue of his paternity.

"I do not think that the certificate constitutes adequate evidence in the report to support the department's finding on what it states is a crucial question here involved. *Cf. United States ex rel Devenuto vs. Curran* (C. C. A.) 299 F. 206, 213.

"(2.) Such evidence, if not taken in question and answer form, should at least be in affidavit form with a statement of deponent's qualifications and of the details on which his conclusions are based.

"The record, therefore, put at its highest, is inconclusive and does not affirmatively show, as it should, that there was a fair trial."

Following this, the judge made further observations in justification of his referring the whole matter of age to a special master to take testimony.

The age of this applicant, seems to be the sole ground upon which the Board based its conclusions. Therefore, the judge's observations, as just quoted, seem very applicable to this case and furnish additional reasons why this applicant has been unjustly and unfairly treated.

As heretofore stated, we have conclusively shown the birth place and the age of this applicant by two competent witnesses. Furthermore, this applicant's brother, only a few years his senior, was regularly admitted from this same port only a year previous to

applicant's hearing. And we feel that the injustice done this applicant, through the mistake of the Special Board of Investigation, should be corrected by directing the issuance of the Writ as prayed for in the lower court.

Respectfully submitted,

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